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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 899

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

No. 942

CHARLES E. BRUNDAGE, ET AL., constituting the NORTHERN PACIFIC STOCKHOLDERS' PROTECTIVE COMMITTEE, APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

No. 999

CITY OF AUBURN, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Interstate Commerce Commission moves that the judgment of the district court be affirmed.

STATEMENT

These are appeals by the Department of Justice, certain minority stockholders of the Northern Pacific Railway Company, and the City of Auburn, Washington, from the judgment of a three-judge district court (Senior Circuit Judge Fahy, Chief Judge Bazelon, and Chief Judge Curran), unanimously sustaining the Interstate Commerce Commission's approval, with substantial conditions, of the "Northern Lines" rail merger. The merger, so conditioned, was found to be consistent with the public interest under Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)). The Commission authorized merger of the Great Northern Railway Company (GN) and the Northern Pacific Railway Company (NP)—together with certain railroads which they already control, including the Chicago, Burlington & Quincy Railroad Company (Burlington). *Great Northern Pacific & Burlington Lines, Inc.—Merger, etc.—Great Northern Railway Company, et al.*, 331 I.C.C. 228 (1967); 331 I.C.C. 869 (1968); 333 I.C.C. 391 (1968).

PROCEEDINGS BEFORE THE COMMISSION

The merger application was filed with the Commission in February of 1961. Eighty-two days of hearings were held during 1961 and 1962 at sixteen cities in Montana, Minnesota, Washington, Illinois, Iowa,

Nebraska, Oregon, North Dakota and South Dakota. The record of those hearings contains over 15,000 pages of transcript, and over 240 exhibits—many of which are multi-page documents embodying statements of prepared testimony. Among those participating in the case were the Departments of Justice and Agriculture, several states and municipalities, labor groups, the appellant Northern Pacific stockholders' group, other railroads, and hundreds of shippers, associations, and civic groups.

After receiving briefs, the examiner issued an extensive 456-page recommended report and order in August of 1964. The examiner recommended approval of the merger, subject to conditions less stringent than those ultimately imposed by the Commission in the decision under review.

By vote of six to five, the Commission disapproved the merger in a report issued on March 21, 1966 (J.S. App. 61), concluding that the merger benefits were outweighed by elimination of competition between GN and NP in the "Northern Tier" (Minnesota, North Dakota, Montana, and Washington), coupled with hardships which the merger would inflict on employees (J.S. App. 156, 166-167).

In this connection, the Commission stated [in this first report]:

> The legislative history of section 5 clearly shows that the Congress did not adopt a policy fostering or encouraging railroad unifications. It was the Transportation Act of 1920, not the Transportation Act of 1940 [amending Section 5 to its present form], that embodied a policy favoring railroad consolidations [J.S. App. 157].

The Commission found that the transaction would produce a loss of 5,200 jobs, with resulting greater impact through the seniority "bumping" process, and concluded that the effect upon employees was a factor militating against the merger (J.S. App. 155, 156, 166-167). Also the Commission devoted much of the first decision (J.S. App. 92-125) to the status of the Chicago and North Western Railway (North Western) and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee), which vigorously opposed the transaction without drastic conditions for their protection. The Northern Lines resisted the conditions, contending that their imposition would be so costly as to deprive the merger of substantial benefits and might preclude consummation. This led the Commission, which viewed most of the North Western and Milwaukee requests as essential, to conclude that if the conditions were imposed, the Northern Lines would then derive only "minimal" benefits and might refuse even to consummate the transaction (J.S. App. 93).

In July of 1966, the Northern Lines filed a petition for reconsideration, stating, *inter alia*, that they were now willing to accept imposition of all conditions sought by North Western and Milwaukee, even beyond those thought necessary by the Commission in the first decision; that they would accept attrition protection for all employees so that none would be adversely affected as a result of the merger; and that merger savings would be greater than indicated in the first report. Many of those who had opposed the merger in its original form then filed papers

indicating support (or withdrawal of opposition). Included in this group were the Secretary of Agriculture of the United States, the North Dakota Public Service Commission, the State of Oregon, the South Dakota Utilities Commission, and the Province of British Columbia.

In January of 1967, the Commission reopened the proceeding for reconsideration and oral argument on all issues, and directed a further hearing limited to determining the amount of merger savings in light of a.) Milwaukee and North Western agreements, and b.) other subsequent changes. These hearings, restricted to the most current information readily available, were held in early 1967. After the filing of briefs, the Commission held oral argument on June 13, 1967.

Meanwhile, in April of 1967, this Court summarily affirmed the lower court's approval of the Commission decision in the Seaboard-Coast Line rail merger. *Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. 993 (M.D. Fla., 1966), affirmed *per curiam*, 386 U.S. 544 (1967). That merger, sustained though it posed a "head-on collision" with the antitrust laws (259 F. Supp. at 996), showed beyond question that competitive considerations, though important, need not compel rejection of a rail merger. Moreover, as we show *infra*, pp. 13-15, Seaboard-Coast Line possessed many characteristics comparable to the situation at bar. Additionally in *B.&O. R. Co.* v. *United States*, 386 U.S. 372, 387 (1967), this Court again made clear that the Transportation Act of 1940 had "carried forward" prior rail merger policy and had not embodied any

policy change, as the Commission had assumed in the first report.

On November 30, 1967, the Commission issued a report sustaining the merger, by a vote of eight to two, and imposing all North Western and Milwaukee conditions, as well as "attrition" protection for labor (J.S. App. 245). The Commission extensively examined existing and post-merger rail competition in the merged territory generally and in the Northern Tier four-state area particularly (J.S. App. 312, 323), concluding, for reasons discussed *infra* at pp. 17-20, that the termination of competition between the Northern Lines should not be the controlling factor.

With respect to merger benefits, all unchallenged on this appeal, the Commission found that the proposed merger would produce some $39 million in annual savings—as against $25 million estimated in the first report. This would enable the Northern Lines to render improved service and earn a return proper for a viable and progressive transportation system (J.S. App. 259, 304-305). Shippers will have available the lines of the entire merged company, thereby receiving fast and more dependable single-line service with shorter through routes; improved car supply, ordering, and tracing; wider routing privileges; generally lower single-line rates; and less switching (J.S. App. 305, 308-309). In addition numerous benefits will accrue through the various Milwaukee conditions discussed, *infra*, and through conditions imposed for other railroads. In all, the Commission found that "this merger can lead to the creation of meaningful rail competition through strengthening of the Milwaukee and the

NW, as well as making the combined applicants a more proficient transport agency" (J.S. App. 344).

The labor attrition conditions provide for total employment security, conferring upon employees "guarantees and job assurances for the rest of their working lives * * *"—protection which "could hardly have been achieved except for the merger" (J.S. App. 325, 326).

Finally, the Commission reserved jurisdiction for five years or such other period as may be prescribed to attach appropriate conditions upon request of any party in interest "necessitated by any cumulative or cross-over problems stemming from approval of this merger and any other transactions authorized under section 5" (J.S. App. 455-456, 479-480).[1]

In two further reports, issued in April and June of 1968 (J.S. App. 463, 498), the Commission again stressed the strengthening of the Milwaukee, revising certain conditions so as to enhance the provision granting Milwaukee access to Portland, and making clear that the eleven Milwaukee "gateways" would be applicable to grain, thereby giving grain shippers a choice of carriers not previously available.

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[1] The Commission had in mind primarily the proposed Milwaukee-North Western merger and consolidated section 5 proceedings involving the Chicago, Rock Island and Pacific Railroad. In December of 1968, the hearing examiner in the *Milwauke-North Western* case issued a report recommending conditional approval. The *Rock Island* hearings closed in August of 1968. Both proceedings are far from final Commission action.

ARGUMENT

A. The Appeal Of The Department Of Justice

1.) This is the fifth major railroad consolidation to come before this Court in a decade. Each was approved by the Commission (subject to conditions) and sustained by the courts where, on balance, attainable economies and efficiencies rendered the transaction consistent with the public interest. The Department of Justice, at one stage or another, opposed most of these, contending that the Commission misapprehended the statutory standard by not attaching greater or controlling weight to antitrust policy and, in any event, had inaccurately assessed the evidence of alleged anticompetitive consequences.

Here the Department does so again, almost totally disregarding the searching analysis and rejection of its arguments by a unanimous court below. The Department would have this Court reconsider and sharply modify its interpretation and application of the carrier merger provisions of the Interstate Commerce Act as embodied in the chain of decisions from *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), through *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173 (1959), to the *Seaboard-Coast Line* merger litigation (242 F. Supp. 14, reversed, *per curiam*, 382 U.S. 154; 259 F. Supp. 993, affirmed, *per curiam*, 386 U.S. 544) and the *Penn-Central Merger & N.&W. Inclusion* litigation (386 U.S. 372 and 389 U.S. 486). Secondly, the Department of Justice asks this Court to undertake an independent balancing of the competitive consequences of the proposed merger versus its benefits.

Asserting the controlling importance of competition between railroads, as against the effectiveness of regulation, the Department contends (J.S. 27) that

> Before approving a merger of healthy carriers who represent the major source of rail competition in a vast area, the Commission should be required to show why the increased "proficiency" and profitability that these already effective and prosperous railroads may achieve by consolidation are likely to benefit shippers more than the cost reductions and rate reductions from new techniques that competitive pressures have historically produced. * * *

Absent "a serious transportation need" or "important public benefits", the Department contends (J.S. 17) that the Northern Lines merger cannot be justified by the "conventional benefits of any such combination of competitors—savings to the parties and some operational efficiencies."

In so contending, the Department simply renews its basic premise in the Seaboard-Coast Line merger litigation that "competition is our fundamental national economic policy" and "applies to the Nation's railroad industry" (Department of Justice district court brief in *F.E.C.* litigation, p. 33). To the contrary, this Court warned in *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86, 91-92 (1953) "that there is a national policy favoring competition cannot be maintained today without careful qualification. * * * It would most strikingly disregard areas where policy has shifted from one of prohibiting restraints on competition to one of providing relief from the rigors of competition, as has been true of railroads."

We need not undertake a detailed analysis of the many cases, beginning with *McLean Trucking Co.* v. *United States, supra,* in which this Court (and the lower Federal courts) has recognized repeatedly that from the Transportation Act of 1920 to date the Congress had prescribed a special national policy with respect to railroad unifications. It is enough that this Court has twice and recently held that "the result of the [Transportation Act of 1940] was a change in the *means,* while the *end* remained the same. The very language of the amended "unification section" expresses clearly the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification." *County of Marin* v. *United States,* 356 U.S. 412, 416-418 (1958); *B.&O. R. Co.* v. *United States,* 386 U.S. 372, 386-387, 459 (1967). Again, in the *Penn-Central Merger Cases,* 389 U.S. 486, 499-500 (1968):

> It is, of course, true that the policy of Congress, set forth in the Transportation Act, to consolidate the railroads of this Nation into a "limited number of systems" is a variation from our traditional national policy, reflected in the antitrust laws, of insisting upon the primacy of competition as the touchstone of economic regulation. Competition is merely one consideration here. See *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154 (1965). * * *

There is no merit to the Department's contention that, absent "a serious transportation need" or "important public benefits", Section 5 of the Interstate Commerce Act requires the Commission to show that

shippers will receive greater benefits from the "conventional" merger savings and efficiencies than from continued competition between the Northern Lines. Clearly, the Department seeks to restrict railroad unification to "failing company" situations.

To begin with, the phrases "a serious transportation need" or "important public benefits" are drawn from a decision of the Federal Maritime Commission that it would approve a steamship conference rule inconsistent with the policies of the antitrust laws only upon a demonstration that the "rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." The opinion in *F.M.C.* v. *Svenska Amerika Linien*, 390 U.S. 238, 246 (1968), heavily relied upon by the Department, sustaining that F.M.C. decision, is a far cry from a holding that the Interstate Commerce Commission *must* similarly qualify the long-standing Congressional policy of permitting a restructuring of the Nation's railroads to a limited number of systems.

To the contrary, as this Court has recognized, Congress has declared that the savings and improved service, such as will result from the Northern Lines merger, are "important public benefits". Thus, in *McLean Trucking Co.*, this Court defined the Commission's duty as follows (321 U.S. at 87):

> * * * the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the con-

> solidation will assist in effectuating the overall transportation policy. * * *

There was no suggestion in *McLean* that the motor carrier merger there involved was justified by "a serious transportation need" or to secure "important public benefits". Clearly, therefore, the "conventional" merger benefits of "improved service" and "lower costs" may be balanced against "the curtailment of competition" which will result from the merger.

In the *Seaboard-Coast Line* merger litigation, the Department made substantially the same contention, characterized by the three-judge court, 259 F. Supp. 993, 1012 as follows:

> [Department of Justice] counsel explained * * * that the government's position really was that where two healthy competitors are involved economies or "dollar savings and other alleged benefits, transportation, service, and such other things" should *never* be enough to overcome severe "elimination of competition", such as here involved (emphasis in original).

The three-judge court held that "this argument cannot, as a matter of law, be used to rewrite the statute" (*id.* at p. 1013). Moreover, in a detailed comparison of the Commission's findings in *McLean Trucking Co.* with its findings in *Seaboard-Coast Line* (259 F. Supp. at 1008-1009), the three-judge court noted that in each case the Commission had relied upon essentially the same benefits of improved service and operating efficiency and savings to the applicants. There, too, there was lacking any "serious transportation need" or "important public benefits" other than the "conventional" rail merger benefits.

The Department does not here challenge the Commission's findings as to the improved service to shippers and the substantial savings to the applicants which will result from the Northern Lines merger. In this posture the present transaction so closely resembles in crucial respects the Seaboard-Coast Line merger, that the action of the three-judge court and of this Court in sustaining the Commission's Seaboard-Coast Line merger order should be dispositive here. *Florida East Coast Ry. Co.* v. *United States, supra,* affirmed *per curiam,* 386 U.S. 544 (1967).

Thus, in the instant case, the Department recites (J.S. 7) that "The Northern Tier region served by the Northern Lines is rich in forest, agricultural and mineral products which in 1963 accounted for 65 percent of Great Northern's carload revenue and 58 percent of that of the Northern Pacific (J.S. App. 75). The long-haul transportation of these products is generally not attractive to motor carriers, and water transportation is not a major factor in the area (J.S. App. 138-139)." By comparison, the three-judge court in the second *F.E.C.* v. *United States* noted that "nine bulk commodities handled by [Seaboard and Coast Line] account for approximately 75-77 percent of their business" (259 F. Supp. at 1004) and that "It is, we think, accurate to say that railroads enjoy a decided economic advantage over all other modes of transport on heavy, long, bulk-haul products in central and western Florida" (259 F. Supp. at 1005).

In *F.E.C.*, the three-judge court noted that "In the six-state area and in an eight-state area, the merged company would control more than 54 percent of the

total railway mileage, while the Southern Railway Company, its nearest competitor, would have about 34 percent. The merged company would have approximately 81 percent of the railway mileage in Florida" (242 F. Supp. at 17). That merger resulted in a rail monopoly at "Tampa and the central and western portions of Florida" (242 F. Supp. at 22). Here, the Northern Lines merger would result in a loss of rail competition in 47 communities (served by both Northern Pacific and Great Northern and by no other railroad) with a total population less than that of the City of Tampa alone (Ex. 15, pp. 24-36, 42-53, 63-74, 81-99). Here, too, the merger would result in the creation of a railroad significantly larger than its nearest competitor (Milwaukee). And here, as in Seaboard-Coast Line, the Commission found that the service improvement and savings resulting from the merger of two reasonably prosperous railroads more than offset the resulting diminution of competition.

Indeed, the only suggested basis for distinction is that the Milwaukee, Northern Lines' remaining immediate rail competitor, historically has not been as strong as the Southern, principal remaining rail competitor of the merged Seaboard-Coast Line. However, Milwaukee is not the Northern Lines' sole competitor.[2] Moreover, as we show *infra*, at pp. 26-29, the unique conditions which the Commission imposed for the en-

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[2] Milwaukee is not the only railroad which competes with the Northern Lines for east-west traffic to and from the Pacific Northwest. The same table (App. 146) upon which the Department relies for its statement that in 1964 Milwaukee carried only 12 percent of this traffic, also shows that Union Pacific carried 26.9 percent. Union Pacific serves such Pacific Northwest points as Portland, Tacoma, Seattle, and Spokane.

hancement of Milwaukee's competitive position will go far in eliminating this historical difference and in providing shippers with a choice of competing rail services.[3]

2.) a.) The fact that a closely divided Commission had earlier reached a contrary result is not a circumstance warranting review. The lower court correctly stated that "* * * the Second Report is now the critical one" (J.S. App. 35), noting in various contexts that the findings of the First Report were "not binding" and did not "invalidate" conclusions in the Second (J.S. App. 35, 39).

The Commission was clearly entitled to change its view even where, as with competitive consequences, the record was largely unchanged. This is particularly so insofar as the prior decision rested on an improper statutory assumption. *Southern Pacific Co.* v. *United States*, 277 F. Supp. 671, 681 (D. Neb. 1967), affirmed *per curiam*, 390 U.S. 744 (1968). As the

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[3] The Department's present position is simply a restatement of its basic view, reiterated from *McLean* through the *Seaboard-Coast Line* litigation, that there should be no special national policy with respect to railroad restructuring and unfication. That contention might be addressed appropriately to the Congress. Indeed, it has been, without success. In 1962, the Senate Judiciary Sub-committee on Antitrust and Monopoly conducted hearings on a bill favored by the Department which would have imposed a moratorium on the Commission's approval of large railroad mergers which would otherwise violate Section 7 of the Clayton Act. See *Hearings on S. 3097*, 87th Cong. 2d Sess. The then-pending Northern Lines merger proposal (and others) were discussed at length. (*Id., e.g.*, pp. 510, 521-524, 600). The bill was not reported out of committee, thereby confirming this Court's consistent reading of the special national policy.

Commission explained, an erroneous construction of the legislative policy had "contributed materially" to the prior consideration of competitive questions (J.S. App. 312). Where the Commission had earlier viewed the 1940 amendments to the Act as somehow more restrictive toward mergers than the 1920 Act (J.S. App. 157-158), it now properly approached the case with this Court's view in *B.&O. Ry. Co.* v. *United States, supra*—that the legislation had made no such change and was indeed designed to facilitate mergers consistent with the public interest (J.S. App. 312-313). The lower court was clearly correct in holding that the analysis of competition in the Second Report "* * * evidenced an understanding of the governing guidelines" (J.S. App. 22).

Moreover, there were several critical intervening events. Agreements as to labor protection meant, as the lower court stated, that "* * * the employee problem disappeared," thereby "* * * eliminating one of the reasons for the First Report's denial of the applications" (J.S. App. 22, 14). Agreement as to the Milwaukee (and North Western) conditions eliminated what the court called "A telling objection to approval of the merger at the time of the First Report * * *" (J.S. App. 26). Third, further hearings showed that an additional $14 million could be saved annually through merger. Fourth, litigation sustaining the Seaboard-Coast Line merger was concluded via summary affirmance in this Court. In addition, after thorough re-examination of the facts, the Commission concluded that GN-NP competition did not require rejection of the merger. In these circum-

stances the existence of the First Report provides no basis for further review.

b.) The Commission properly exercised its judgment in concluding that preservation of GN-NP competition should not be decisive. As the lower court said, the Commission "* * * analyzed the competitive problem in detail" (J.S. App. 22). Here, as in Seaboard-Coast Line, it was frankly recognized that merger would eliminate such competition as exists between the applicants (J.S. App. 313).

Focusing on the Northern Tier (Minnesota, North Dakota, Montana, and Washington), the Commission found that the lines were often not competitive because they were widely separated. As the Commission explained: "obviously a shipper located on or near the lines of one road, but 50 or 100 miles from the line of another, is not influenced by competition in the selection of carriers" (J.S. App. 316).

Next, as the lower court noted, the Commission found "* * * that the number of stations at which competition would be entirely eliminated was small, * * *" (J.S. App. 24). These points, served only by GN and NP, amounted to 47 communities which comprised only 4.25% of all stations of the merging roads in the Northern Tier, and produced comparatively small shares of business (J.S. App. 316-317). Moreover, a finding also noted below (J.S. App. 22), the Commission explained that competition at some of these points was "more theoretical than real" where they were served by the main line of one road and a branch line of the other (J.S. App. 317).

Location of lines, *inter alia*, underlies the finding as to stations served by GN, NP, and one or more other roads—where competition would theoretically be reduced but not eliminated. Here the Commission stated

> Apportionment of traffic between GN, NP and the other roads serving these points is not wholly the result of interplay of competitive forces, but often results from other factors entirely (J.S. App. 319).

As explained by the lower court, where stations "* * * are located on the branch line of one applicant and on the main line of another, the time factor may eliminate the branch line as a realistic competitor. Thus, the branch line of one railroad is more complementary than competitive with the main line of the other" (J.S. App. 25).

Physical location of the shipper's or consignee's facility is also among the "other factors", beyond competition, entering into apportionment of traffic. As the lower court observed, this circumstance of location alone "* * * gives one railroad a decided advantage although the other railroad is only a short distance away" (J.S. App. 25).

Another noncompetitive factor influencing choice of carriers was recognized below, albeit in a different context,—"the practice of some large shippers of distributing their business among the various railroads * * *" (J.S. App. 25). Competitive considerations are of little significance to shippers who simply

follow a policy of dividing traffic among available roads.[4]

The Commission also found, in the lower court's words (J.S. App. 24),

> * * * that the locations at which competition would be most significantly reduced would still have available substantial rail and nonrail carriers so as to preserve sufficient competition to warrant the merger.

Major terminals, such as Duluth-Superior, Portland, Seattle, Spokane, and the Twin Cities "* * * would be served after the merger by at least three railroads * * *" (J.S. App. 23). In many instances the points where competition would be reduced, but not eliminated, would be served by the Milwaukee, substantially strengthened as a competitor by virtue of conditions imposed in this case. See *infra*, pp. 24-29. The Commission then elected to give considerable weight to support for the merger emanating from a large group of Northern Tier witnesses (J.S. App. 320).[5] At the same time the agency found that testi-

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[4] See *Chesapeake & Ohio Ry. Co.—Control—B&O R. Co.*, 317 I.C.C. 261, 282 (1962), *sustained sub nom. Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19 (E.D. Mich., 1963), *affirmed per curiam*, 375 U.S. 216, recognizing that "As a matter of policy, national account traffic generally is allocated proportionately among the various competing railroads."

[5] Among those supporting the merger, with or without conditions, were representatives of many Northern Tier communities where competition would be eliminated or reduced: Billings Traffic Bureau and Chamber of Commerce (Tr. 13810, 13779); St. Paul Area Chamber of Commerce (Tr. 10089,

mony favoring rail competition was "abstract and unparticularized," that some witnesses—singled out in the First Report on this score—had actually supported a properly conditioned merger, and that others "had perceived no differences in service as between the competitive and noncompetitive points" (J.S. App. 320).

All of these findings evince a careful and rational analysis of the competitive situation. All were found by the lower court to be reasonable and supported by

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10286); Minneapolis Traffic Association and Chamber of Commerce (Tr. 3704); The Port of Everett, Washington (Tr. 6155-61); Everett Chamber of Commerce (Tr. 6182); Butte Chamber of Commerce (Tr. 12791); Spokane Chamber of Commerce (Tr. 7292); Bemidji Minnesota Chamber of Commerce (Tr. 10406); Fargo, North Dakota, Chamber of Commerce (Tr. 11645); Port of Tacoma and Tacoma Chamber of Commerce (Tr. 6161); Grand Forks, North Dakota, Chamber of Commerce (Tr. 11688); Whatcom County Traffic and Rates Bureau, Bellingham, Washington (Tr. 7122); and the Seattle Traffic Association and Chamber of Commerce (Tr. 6205). Support also emanated from the following Northern Tier groups, among others: Washington State Farm Bureau (4500 members, Tr. 5709); Northwest Horticultural Council (representing virtually all Washington fruit growers, Tr. 5661); Washington Cattlemens' Association (3500 members, Tr. 6040); Farmers' Grain Dealers Association (410 North Dakota grain elevator operators, Tr. 11141); Western Sugar Beet Growers Association (nearly 4000 growers throughout Northern Tier and Iowa, Tr. 11196); North Dakota Stockmens' Association (2500 members, Tr. 11856); Minnesota Farm Bureau Federation (30,000 members, Tr. 3985); North Dakota Farm Bureau (16,000 members, Tr. 11055); Montana Stockgrowers Association (most Montana livestock producers, Tr. 12471); Montana State Grange (15000 members, Tr. 12441); and the Montana Farm Bureau Federation (292 members, Tr. 12650).

substantial evidence (J.S. App. 37-38). There is no occasion for further review of the facts dealing with the competitive consequences of this merger.

c.) The lower court properly noted "the weakness of the Department of Justice's emphasis on raw statistics", recognizing that in some respects percentages tended to "over-emphasize the importance of" rail competition (J.S. 24). Thus, the claim that elimination or reduction of Northern Tier competition amounts to 43% and 37% (J.S. 23), respectively, of the Northern Lines' gross revenue and tons cannot bear close scrutiny. As the lower court noted (J.S. App. 25), the tonnage figures were "misleading" because shipments moving on the same line had been counted twice—once at origin and once again at destination (Tr. 3197-3199, 3217-3218). Moreover, as the lower court explained (J.S. App. 24-25), the revenue figures included all traffic received at competitive terminals although the origin may have been wholly non-competitive, a factor particularly significant here since major terminals such as the Twin Cities and Seattle were among the points measured. At most, as the Commission concluded in the second decision, the obverse of the figures reflect merely those percentages clearly unaffected by merger (J.S. at 316-317).

The Department similarly relies on a statement in the first report that "* * * available data indicates that the New Company would handle roughly 61 percent of the carload traffic moving westbound and 83 percent moving eastbound from the Northwest" (J.S. 9, 24; J.S. App. 147). These figures apparently came from evidence (Tr. 6740-6741; Exhibit 99, Attach-

ment 12) showing numbers of cars moving East and West through four points served on an exclusive basis by GN, NP, Milwaukee and Union Pacific. Measured by this four-station standard, it is true that in 1960, GN and NP together carried about 60% of the eastbound and westbound cars, as against some 40% for Milwaukee and Union Pacific.[6] But this merely shows that more cars moved through the two GN-NP points than moved through the two Milwaukee and Union Pacific points. The figures do not include origins or destinations of the cars and do not show, as the Department claims, "traffic between the Northwest and Twin Cities" (J.S. 9, 24). For all that appears, a substantial number of "local" cars may well have moved through one or more of the four stations. Nor do such figures tell anything meaningful about competition between GN and NP. There is no indication as to how many cars reflected non-competitive origins or destinations. Then, too, as the lower court observed (J.S. App. 25), the respective shares (between the merged company, Milwaukee, and UP, for example) may well become more competitive insofar as some shippers simply spread traffic among available roads. Moreover, these percentages took no account of the Mil-

[6] The figure of 83% in the first decision, relied upon by the Department here, was apparently produced by excluding Union Pacific entirely and treating GN, NP and Milwaukee as the whole. Using this method, it could be shown that the Northern Lines together handled 82.5% of the cars, with Milwaukee handling the remaining 17.5%. Union Pacific is, of course, an important transcontinental competitor from and to the Northwest—as the Commission recognized even in the first report (J.S. App. 145)—and cannot be excluded from measurement.

waukee conditions, which, under any view, will increase the traffic of that carrier.

Under all of these circumstances, the statistical claims present no occasion for this Court to re-weigh the evidence. The evaluation of competition is entrusted to the informed judgment of the Commission, which properly declined to accept percentages at face value. The subject is purely factual, presenting no question of law, and does not warrant plenary review by this Court.

d.) The Department's comments as to the weight of the evidence dealing with intermodal competition (J.S. 7, 9-10, 23), present no question appropriate for review. That such competition may be considered in a rail merger case is established. *Penn-Central Merger Cases, supra,* 389 U.S. at 501; *Florida East Coast Ry. Co.* v. *United States, supra,* 259 F. Supp. at 1010, 1014-1015. The weighing of evidence is for the Commission and not the courts. *Illinois C. R. Co.* v. *Norfolk & W. Ry. Co.*, 385 U.S. 57, 67, 69 (1966). Accordingly, we rest on the opinion of the lower court which thoroughly examined the matter (J.S. App. 34-38), concluding that there was "substantial basis for the Commission's conclusion that motor carriers are ready substitutes for, and vigorous competitors with, rail transportation in the Northern Tier" (J.A. App. 36).

Railroads, as a group, do not compete in a vacuum. Indeed the very benefits stressed by the Department—"New type of service" such as special cars, piggyback and improved operating techniques (J.S. 26)—are rooted not in rail rivalry but in intense truck and

barge competition. This is clearly so as to "piggyback," as to "jumbo" tank and hopper cars, and as to the introduction of "cost-saving techniques and devices" to meet intermodal competition in hauling automobiles—all instances involving traffic once regarded as virtually the captive of the railroads.[7]

3.) a.) The Department's attempt to deprecate the Milwaukee conditions (J.S. 25-26) is wholly at odds with their evaluation by the Commission, the Milwaukee itself, numerous Governmental units—including the Department of Agriculture (the Nation's largest shipper of agricultural commodities)—and hundreds of other shippers, associations, and groups.

The Commission repeatedly found that Milwaukee, with the advantage of shorter routes and superior grades, would, by virtue of the conditions, become a transcontinental carrier capable of providing genuine competition to the merged company (J.S. App. 311, 315, 321, 322-323, 344, 468, 475, 486, 500-501). Evaluation of protective conditions is particularly a matter for the judgment of the Commission. *Erie-Lackawanna R. Co.* v. *United States*, 279 F. Supp. 316,

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[7] *Substituted Service—Piggyback*, 322 I.C.C. 301, 305-307 (1964), sustained *sub nom., American Trucking Associations* v. *A., T. & S.F. Ry. Co.*, 387 U.S. 397 (1967); *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 95 (1954); *Meats, Fruits, Vegetables—TOFC—Transcontinental*, 316 I.C.C. 585, 594 (1962) ("piggyback"); *Liquefied Petroleum Gas in Jumbo Tank Cars*, 319 I.C.C. 31, 40 (1963); *Grain in Multiple-Car Shipments—River Crossings to the South*, 325 I.C.C. 752 (1965) ("jumbo" tank and hopper cars); *Pennsylvania R. Co. —Merger—New York Central R. Co.*, 327 I.C.C. 475, 517 (1966) and cases there cited (new techniques in hauling autos).

328, 353-354 (S.D.N.Y. 1967), affirmed *sub nom., Penn-Central Merger Cases, supra; Florida East Coast Ry. Co.* v. *United States, supra,* 259 F. Supp. at 1016, affirmed *per curiam,* 386 U.S. 544.

The Milwaukee shares the Commission's view of the conditions. Indeed, its president, in an affidavit filed with the court below, stated, *inter alia*:

> In my opinion, the Milwaukee, if the proposed merger and conditions take effect, will be a more effective competitor against the merged company than it has been against its separate competitors, Great Northern and Northern Pacific. * * * [W]ith its requested conditions, the Milwaukee will be able to provide shippers with better service, better rates, and a wider choice of routes than ever before, and thus offer the merged company the competition which it has long been unable to provide in the territory between the Twin Cities and the Pacific Northwest.

This view is confirmed by the position of Oregon, which opposed the merger in its original form, but now supports the transaction as conditioned, stressing competitive and service benefits flowing from the conditions.[8] Similarly, the Department of Agriculture stated:

> The Secretary's position in regard to the proposed merger has been that considerable benefit could accrue to the agricultural community provided certain conditions were imposed that would

[8] District Court Brief of Public Utility Commissioner of Oregon, pp. 2-4.

> open gateways to competing railroads thus creating more vigorous competition.
>
> * * * *
>
> If these conditions were to be imposed by the Commission, we believe that additional benefits would be furnished to agriculture and the public.[9]

Indeed, in June of 1968, the then Undersecretary of Agriculture wrote to then Attorney General Clark, reiterating the Department's position, concluding "We do not object to the merger inasmuch as it will result in benefits to agriculture."

b.) Milwaukee's competitive handicap and need for conditions were clearly described by the lower court (J.S. App. 27-28):

> One of the main lines of Milwaukee runs from Chicago through the Twin Cities and across the Northern Tier States to the Pacific Coast. Milwaukee's original expectations for greater competition with applicants, as matters developed, did not materialize. A substantial reason was that its lines were blunted by not reaching Portland, Oregon, or Bieber, California. Neither Great Northern nor Northern Pacific would interchange traffic with Milwaukee except in circumstances which gave Northern Lines the longest possible haul over their own roads. This privilege of Northern Lines not to "shorthaul" themselves means that traffic originating on the Milwaukee east of the Twin Cities and destined for Portland or California was required to be turned over to

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[9] Reply of Secretary of Agriculture to applicants' Petition for Reconsideration, filed October 24, 1966.

> one of the merging lines at the Twin Cities. As a consequence, Milwaukee was precluded from being a true transcontinental competitor and was unable to make full use of its extensive trackage ending only a few miles short of Portland. Moreover, Milwaukee was completely precluded from the extensive North-South traffic on the West Coast. Similarly, traffic destined for intermediate points on one of the Northern Lines had to be transferred to that line at the Twin Cities even though there were several junctions among Milwaukee and Northern Lines farther west. * * *

Hence, as the lower court recognized, conditions were imposed "to alleviate Milwaukee's disabilities and to make it a stronger competitor * * *" (J.S. App. 29). First, Condition 23 (J.S. App. 449, 493) will, as noted below, "open to Milwaukee gateways at eleven points in the Northern Tier, thus allowing it to utilize more of its trackage west of the Twin Cities" (J.S. App. 29). This condition opens new areas (2 in North Dakota, 6 in Montana, and 3 in Washington) to Milwaukee, affording it an opportunity to compete more effectively for traffic now confined to the Northern Lines. At the present time, in order to protect the individual Northern Lines' long haul, each applies higher rates on traffic routed for interchange with Milwaukee at a junction short of the greatest distance the particular Northern Line can haul it. Under such circumstances, obviously all traffic moves over the Northern Lines to the farthest junction. By opening eleven gateways, the Milwaukee can offer competitive rates and solicit traffic for its own long haul. At the same time, the condition will "give many shippers a

realistic choice of railroads for the first time in history" (J.S. App. 311).

Condition 24(a), as the lower court explained (J.S. App. 29):

> * * * will allow the Milwaukee to extend its present termination point from Longview Junction another 47 miles into Portland and there to connect with the Union Pacific so as, for the first time, to be able to compete with Northern Lines transcontinental routes as well as to provide competing North-South service on the West Coast. * * *

This condition converts the Milwaukee into a competitive transcontinental railroad, enabling it to offer Chicago and intermediate shippers a competitive service on transcontinental traffic. By connecting with Southern Pacific at Portland, for example, Milwaukee can offer service to other West Coast points in California and Oregon.

Condition 24(b), simply stated in the lower court's language, "will allow Milwaukee to connect directly with Canadian roads north of Portland" (J.S. App. 29), empowering the carrier to provide competitive service on north-south traffic between British Columbia and Portland. Condition 24(c), as the court below stated, "allows Milwaukee to serve Billings, one of the two largest cities in Montana, which is presently served only by the Northern Lines" (J.S. App. 30). The Milwaukee will also be strengthened by Condition 25(a), requiring elimination of the existing basis of switching charges, whereby shippers at points where Milwaukee competes with the Northern Lines, must

pay a higher switching charge to move traffic via Milwaukee than via one of the Northern Lines. Finally Condition 25(b) requires that whenever existing Northern Lines' rates are adjusted, after merger, a comparable adjustment will be made on competing traffic interchanged by the merged company with Milwaukee.

c.) The Department's attempt to downgrade the conditions is fully answered in the opinion below (J.S. App. 31): [10]

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[10] Claims that the conditions would be worth $11.8 million to Milwaukee, and that this would increase its "net railway income" by only 4.9% (J.S. 25-26) are inaccurate. The Department's $11.8 million is computed on the basis of a figure ($14.8) given in the first report, which did not account for the "Billings" condition, valued at $1.2 million (Tr. 6477, 6488; Ex. 244, p. 28). Hence the computation should begin with a figure of $16 million, not $14.8 million. Moreover, the value should not be automatically reduced by a 20% "contingency" allowance, merely because the Commission employed such allowance as a conservative measure of the lowest possible merger savings. The contingency percentage could be employed so as to increase as well as reduce valuation figures. (Tr. 1813-1814). On this basis, therefore, the conditions may be viewed as worth between $12.8 million and $19.2 million annually. Additionally, the conditions will bring some additional revenue to Milwaukee from Union Pacific, which estimated its annual losses at $1.7 million annually. The Commission, while initially finding that this diversion would be slight (J.S. App. 333), subsequently held that even $1.7 million would not be significant as to UP considering its size (J.S. App. 470). Moreover, the Department inadvertently confuses gross railway revenues with "net operating income" (J.S. 26). An increase of $12 to $20 million in gross revenue, while substantial in itself, may result in a more significant percentage contribution to net income. Due to large fixed costs, fluctuations in railroad revenue have even greater

> The evidence gives substantial support to the conclusion of enhanced competition by Milwaukee, with traffic diversions to it from the merged lines. The Commission's reliance upon this factor in reaching its conclusion that the merger was in the public interest must be accepted as valid, even though the merged lines will have a larger market share than Milwaukee. Milwaukee, by no means a negligible competitor previously, will become for the first time a much strengthened competitor, realistically vying for long haul traffic at every major point served by Northern Lines. * * *

B. The Appeal Of The NP Stockholders' Committee

1.) The Stockholders' Protective Committee representing, as the lower court noted, "only 3 percent of Northern Pacific's stockholders holding about 5 percent of the stock * * *" (J.S. App. 43), contends that the terms of stock exchange did not fairly reflect the value of natural resources properties owned by NP. This appellant presents no case warranting plenary review.

a.) Its position has been twice repudiated by NP stockholders. In 1961 the merger terms were approved by 73.8 percent of the NP stockholders, with only 6.6 percent voting against. Again in 1968, despite a vigorous solicitation campaign by the committee, over 73 percent of the stockholders approved the terms, as

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impact on net revenue. For example, if only $3 million of the revenue produced by the conditions (25% of the most conservative estimate of the gross) carried over into net income, Milwaukee's net income would be increased by over 40% as to 1965 (J.S. App. 105), and by nearly 50% as to reported figures for 1968 (*New York Times*, Jan. 30, 1969, p. 51).

against a negative vote of only 2.5 percent. Then, too, the terms of the exchange were agreed upon after years of negotiation—involving separate financial advisors retained by each road—during which the natural resources question was fully debated. The Commission and the court below (J.S. App. 45) properly treated this prolonged arms-length bargaining as evidence of fairness, as customary in these cases. See *Penn-Central Merger Cases, supra*, 389 U.S. at 523; *Minneapolis & St. Louis R. Co.* v. *United States, supra*, 361 U.S. at 192. Determinations as to the fairness of merger stock exchange terms rest largely in the agency's discretion, which may properly be exercised though "reasonable men differ in detail, * * *" *Penn-Central Merger Cases, supra*, 389 U.S. at 524; see also *Friedman* v. *United States*, 168 F. Supp. 815, 818 (S.D. N.Y. 1958), affirmed *per curiam*, 359 U.S. 205; *Fried* v. *United States*, 212 F. Supp. 886, 889 (S.D. N.Y. 1963). The questions are essentially factual, involving no issues of law. Under these circumstances there is no warrant for further review.

b.) Moreover the Committee presents no substantial question on the merits.[11] The Commission properly found that "the full potential value of the natural resources properties was fully reflected in the shares allotted to the Northern Pacific stockholders" (J.S. App. 296). Under the terms of exchange, stockhold-

[11] There is nothing unique about NP's ownership of non-railroad properties. Many major roads own such properties, which produce significant amounts of income. Hence the evaluation of non-railroad property is not somehow beyond the range of matters intelligently considered by either management or the Commission.

ers of GN and NP will receive one share of common stock in the new company for each share of stock presently held. In addition, each GN stockholder will receive ½ share of $10 par value 5½% preferred stock for each GN share held. The preferred stock is redeemable at any time after five years at the company's option, and will be retired in any event within 30 years.

As explained by NP's president (and chief negotiator), and by its financial consultant (Morgan-Stanley & Company), the preferred stock gives temporary recognition to GN's historically higher earning power, higher dividends, and higher market price, while, on a long-term basis, assuring equal participation to NP stockholders in recognition of the potential value of the natural resources (Tr. 117-124; 326-327). That the natural resources may produce greater income in the future than in the past was explicitly recognized by NP's financial consultant who evaluated the fairness of the exchange on precisely that assumption (Tr. 326-327). Similarly, GN's financial consultant utilized "prospective income" from the property as a basis for his advice, giving recently past earnings of the natural resources a weight of about 150 percent to reflect the probability of future development (Tr. 2570, 2572, 2599).

The instant case poses no question under *Schwabacher* v. *United States*, 334 U.S. 182 (1948). There, but not here, the Commission had failed to decide certain stockholder claims, thereby turning over to a state court part of the function entrusted to the agency by Congress. The natural resources question, on the

other hand, was discussed and decided on two occasions in the case at bar (J.S. App. 286-297; 470-471).

The Commission was not required, as a matter of law, to reopen the record for updating. Reliance upon *Atchison, T. & S.F. Ry. Co.* v. *United States*, 284 U.S. 248 (1931) is misplaced, since this Court "promptly restricted that decision to its special facts * * * and it stands virtually alone." *I.C.C.* v. *Jersey City*, 322 U.S. 503, 515 (1944). Major rail merger cases are necessarily time consuming, with several years inevitably expiring between the original application and final decision and consummation. The decision in *Schwabacher* v. *United States*, *supra*, 334 U.S. at 189, as to "current worth," should not be read so as to require endless rehearings and resubmission of terms to stockholders. As this Court noted in *Jersey City*, *supra*, 322 U.S. at 514, lengthy and complex administrative proceedings would hardly ever conclude if "* * * litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered * * *." [12]

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[12] Comparative performance of the two roads through the years clearly shows GN's edge. Its net income has consistently been higher than NP's with an average difference of $7½ million during the five-year period 1955-59; GN's dividend during that period was $3 per share, compared with $2.20 per share for NP; and through the years the market price of GN stock has consistently been above that of NP. For the years 1960-1966, GN's net income was $2 million to $8 million higher than that of NP. That GN superiority did not prevail in 1967 requires no different result. *Jersey City*, *supra*. That year was generally a poor one for railroads and a carrier with significant non-railroad properties, such as NP, would

Other arguments are without merit. The Commission was not required to make subsidiary findings as to all of the Committee's arguments and evidence. *Minneapolis & St. Louis R. Co.* v. *United States*, *supra*, 361 U.S. at 192-194; *Stott* v. *United States*, 166 F. Supp. 851, 862 (S.D. N.Y. 1958) (as to rail merger exchange terms). Nor was there any requirement that a specific monetary figure be assigned to the natural resources properties. To assign specific dollar figures to every category of property owned by roads contemplating merger could well thwart any negotiations at the outset. *Cf.*, *Group of Investors* v. *Milwaukee R. Co.*, 318 U.S. 523, 561, 565 (1943). This is especially so where, as here, even the Committee Chairman testified that the NP natural resources "defy anything approaching an exact appraisal" (Tr. 9925). Finally the Commission acted well within its discretion in rejecting the Committee's real aim (Tr. 9924)—a premerger segregation and sale of the natural resources properties for the benefit of those who wished to buy in. Such a plan was explored by NP, but rejected because of the likelihood of extended litigation from Lien Mortgage Trustees, and because disposition of the lands subject to the mortgages would produce substantial adverse tax consequences. Moreover, as the Commis-

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naturally appear better. Moreover, in 1967, according to GN, 62 percent of its drop in net income was due to loss of grain traffic, since the bulk of the grain crop had been placed in storage and not yet shipped. Additionally, loss of copper and automobile traffic was attributed to industry work stoppages occurring that year. (Great Northern Railway, Annual Report to Stockholders, 1967, pp. 2, 4).

ion noted, such a proposal would be unfair to NP stockholders, requiring that they "* * * repurchase interests in property they already own, with those failing to do so frozen out of future benefits therefrom" (J.S. App. 297).

C. The Appeal Of The City Of Auburn

The parochial appeal of the City of Auburn is based primarily upon claims of adverse impact, stemming from the once proposed closing of an NP yard, part of the original merger plan. As to the few local communities opposing the merger, including Auburn, the Commission found that any dislocations would be temporary and generally that adverse impact "* * * would be offset by positive benefits" (J.S. App. 335). In any event, even fears as to the closing of the yard have proved unfounded. NP's President and a GN Vice President filed affidavits in Auburn's original suit [13] stating that due to increased growth in the area and revised plans, the Auburn facilities would not be scrapped and would indeed be expanded. Then, too, the execution of agreements between labor and the Northern Lines, as approved by the Commission, make clear that all employees will receive protection and that none—in Auburn

[13] *City of Auburn* v. *United States*, C.A. No. 7706, U.S. District Court, W.D. Wash. The contention that the merger "* * * would reduce Auburn's freight service to one local train daily in each direction between Auburn and Yakima" (J.S.) is unfounded. Auburn refrains from challenging the affidavit of NP's General Superintendent of Transportation, that Auburn will be served by at least seven daily trains—five moving north-south, and two handling transcontinental traffic through Auburn via Yakima.

or anywhere else—will be adversely affected. As the lower court observed "None of the employees of the Northern Lines joined Auburn in urging disapproval of the merger" (J.P. App. 53). Moreover, local interest in preservation of a particular rail facility cannot, as a matter of law, obstruct a consolidation consistent with the public interest. *Texas* v. *United States*, 292 U.S. 522 (1934).

As we have shown, *supra*, at p. 33, contentions as to further hearings do not warrant plenary review. These matters may be resolved under the rule of *I.C.C.* v. *Jersey City*, *supra*. In addition, the City made no request for further hearing before the Commission, introduced no evidence at the further hearings conducted in early 1967, and did not petition for reconsideration of the report approving the merger. Nor was the City's fear of "serious injury to Rio Grande," which does not serve Auburn, ever presented to the Commission. Moreover, the Commission extensively examined the status of that road (J.S. App. 337-342; 471-475) which does not now oppose the merger, and carefully reserved jurisdiction to impose conditions for its benefit (J.S. App. 455-456; 479-480). Finally the City's interest in subsequent "train abandonment proposals" (J.S. 6) can be asserted, and, if necessary, litigated as specific proposals come before the Commission. *Penn-Central Merger Cases*, *supra*, 389 U.S. at 505-506.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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FEBRUARY 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 332334 471

MOTION

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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~942~~ 38

CHARLES E. BRUNDAGE, ET AL., constituting the NORTHERN PACIFIC STOCKHOLDERS' PROTECTIVE COMMITTEE,

Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF GREAT NORTHERN RAILWAY COMPANY, ET AL., TO AFFIRM

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February, 1969

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF GREAT NORTHERN RAILWAY COMPANY, ET AL., TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees Great Northern Railway Company, Northern Pacific Railway Company, Chicago, Burlington & Quincy Railroad Company, Spokane, Portland and Seattle Railway Company, Pacific Coast R.R. Co. and Great Northern Pacific & Burlington Lines, Inc.[1] move that the judgment of the District Court be affirmed on the ground that the

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[1] Herein called Great Northern, Northern Pacific, Burlington, SP&S, Pacific Coast, the merged company and, collectively, the applicants. Great Northern and Northern Pacific are sometimes referred to as the Northern Lines.

questions presented are so clearly lacking in substance as not to warrant further briefing and oral argument.

This appeal relates only to the corporate merger terms between Great Northern and Northern Pacific that the Interstate Commerce Commission determined to be just and reasonable in approving the transactions.[2] The three-judge District Court sustained the Commission's action with respect to this and to other matters.[3] The court summarized the approved exchange terms for Great Northern and Northern Pacific stock[4] as follows:

> "Northern Pacific stockholders would receive common stock [of the merged company] on a share for share basis. Great Northern stockholders would receive stock

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[2] Great Northern and Northern Pacific for many years have owned, in equal shares, all of the stock of SP&S and more than 97 percent of the stock of Burlington, and Great Northern owns all of the stock of Pacific Coast. In the transactions approved by the Commission (subject to 34 conditions imposed in the order of approval) Great Northern, Northern Pacific, Burlington and Pacific Coast will be merged into, and the properties of SP&S will be leased to, the merged company.

[3] Separate appeals, which do not concern the financial terms of the merger, have been docketed in this Court by the Solicitor General (No. 899), the City of Auburn (No. 999) and the Livingston Anti-Merger Committee (No. 1003). Appellees Great Northern, et al., have filed a motion to affirm in No. 899 and that motion contains a discussion, not repeated here, of the general background of the transactions, the Commission's findings and conclusions and the opinion of the District Court with respect to matters other than the approved financial terms. These appellees are also moving to affirm in Nos. 999 and 1003.

[4] The Burlington stock owned by Great Northern and Northern Pacific will be cancelled. With respect to the remaining Burlington stock (less than 3 percent) each share will be exchanged for 3.25 shares in the merged company. The terms concerning Burlington stock were also found to be just and reasonable and they are not challenged by appellants.

on a share for share basis plus one-half share of New Company's $10.00 par value 5½ percent preferred stock for each share of Great Northern stock held at the date of the merger. The preferred stock is to be retired, through the operation of a mandatory sinking fund, over a 25 year period beginning at the fifth anniversary of the merger. Also, the preferred stock would be redeemable at the option of New Company after the fifth anniversary . . ." (App. 42-43)[5]

The four appellants created, and constitute the membership of, the Northern Pacific Stockholders Protective Committee (NPSC). The NPSC "appears to represent some 3 percent of Northern Pacific stockholders holding about 5 percent of the stock of that company" (App. 43, 292, 470).[6] The four appellants are or were members of a New York investment counseling firm and most of the shares represented are evidently held by clients of the firm (Tr. 9937).

NPSC raises no issues concerning the transportation merits of the proposed merger, the conditions attached to enhance rail competition or the guarantees for employees. In fact appellants agree that a merger, at least of the railroad properties, is desirable. Their sole concern is, as it has been throughout the proceedings, with increasing or rearranging the interests that Northern Pacific stockholders will receive as a result of the transactions approved by the Commission.

As shown below, the Northern Pacific stockholders have twice voted overwhelmingly in favor of the merger terms to which NPSC objects. At the special meeting of Northern

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[5] The reports and orders of the Commission and the opinion of the District Court are reproduced in the Appendix to Jurisdictional Statement for the United States in No. 899. That Appendix will be referred to herein as "App."

[6] Northern Pacific has only a single class (common) of stock outstanding.

Pacific stockholders in 1968, the vote was 73.20 percent in favor and only 2.57 percent against approval of the merger on the agreed terms. NPSC's arguments, vigorously expressed in its solicitation material, were rejected by the great body of Northern Pacific stockholders.

STATEMENT

The history of the negotiations leading to the agreement between Great Northern and Northern Pacific with respect to the financial terms of their proposed merger is reviewed in detail in the Examiner's Report (pp. 200-222), the Commission's report on reconsideration and further hearing (App. 289-296) and the opinion of the District Court (App. 43-45).

The record shows that in 1955 officials of Great Northern and Northern Pacific began discussions of terms of a merger "and thenceforth engaged in extensive negotiations . . ." (App. 43). These discussions and negotiations continued until June 2, 1960—a period of almost 5½ years —when the managements of the two companies agreed upon the exchange ratios at issue here.

During this extended period, the two companies jointly employed an independent transportation engineering firm to study the railroad properties and evaluate the advantages and savings to be achieved through merger (App. 43, 256, 289). In addition, each company separately sought independent advice with respect to financial matters, Great Northern retaining the First Boston Corporation and Northern Pacific retaining Morgan Stanley and Company (App. 43, 290). Similarly, each company employed independent appraisers to evaluate the natural resources properties owned by Northern Pacific (App. 289; Tr. 89-90, 95).

On the basis of their independent studies, First Boston

advised Great Northern that considering only earnings from railroad operations and common sources (*e.g.*, Burlington and SP&S), Great Northern contributed 66 percent and Northern Pacific 34 percent of the combined earning power, and Morgan Stanley advised Northern Pacific that, on the same basis, the ratio was 60-40 in favor of Great Northern (App. 290).

First Boston initially recommended that Great Northern stockholders should be favored over those of Northern Pacific by a ratio of 1.2 to 1 (Tr. 2591). Morgan Stanley arrived at a judgment value of $115 to $125 million for the Northern Pacific natural resources properties, including industrial property, and initially suggested a share-for-share exchange for both companies (App. 290).[7]

Thus, the area of difference between these initial recommendations of the two sets of financial advisers was whether 1 share or 1.2 shares of the merged company's common stock should be exchanged for each share of Great Northern stock. Both proposed that Northern Pacific receive new stock on a 1 for 1 basis. In the final resolution of the controversy, the financial advisers agreed that the stock exchange ratios ultimately approved by the Commission were fair to both parties (App. 45, 291; Tr. 326-327, 388). On the agreed terms, the 1 for 1 ratio applies to the exchange of the shares of both companies for shares of the common stock of the merged company. However, instead of getting an additional one-fifth of a share of common stock of the merged company, as First Boston had initially recommended, each Great Northern share will receive one-half of

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[7] However, the parties subsequently agreed that Northern Pacific's industrial properties (valued at $32.7 million) should not be considered separately from its railroad properties, since similar Great Northern properties had been included in its railroad properties (App. 290-291; Exam. Rep. 202-203).

a $10 share of 5½ percent preferred stock that will be later redeemed, leaving outstanding only the common stock in which the stockholders of Great Northern and Northern Pacific share on a 1 for 1 basis. These are the terms to which NPSC objects, seeking either segregation and sale of Northern Pacific's natural resources properties or even more favorable terms for Northern Pacific stock.

Recognizing the problems inherent in valuing the natural resources properties in arriving at merger terms, the negotiators considered establishing two classes of stock, one related to Northern Pacific's natural resources properties which would be distributed only to Northern Pacific stockholders, and the other, related to the rail operations, to be distributed to the stockholders of both companies (App. 44, 291). This was rejected because of the difficulties of administering the two different classes of stock (App. 44). The negotiators also considered spinning off the natural resources properties prior to merger (App. 44, 291). This was rejected because of the problems which would arise with mortgage trustees and bondholders and the consequent prospects of protracted litigation, as well as the prohibitive tax consequences of such a transaction (App. 44). The negotiators concluded that the properties would have to be included in the merger (App. 44, 291).

Having reached this conclusion, the railroads requested their respective financial advisers to seek terms each adviser could recommend to its principal as a basis for further negotiation (App. 291). In the course of these negotiations both sides retreated from their previous bargaining positions. Great Northern yielded in its view that its greater earning power required that its stockholders be given a larger share of the combined enterprise on a permanent basis and Northern Pacific modified its contention that the combination of its rail earnings and natural

resources properties entitled it to immediate equality (App. 44, 291). The terms arrived at were designed to give some temporary recognition to Great Northern's larger earning power, higher dividends and historically higher market price through the issuance of preferred stock, while (by providing for the mandatory retirement of that preferred stock) "preserving for Northern Pacific stockholders on a long-term basis approximately equal participation in the earnings of the combined enterprise" (App. 291). The Commission noted that "On the basis of past earnings experience, the merger terms slightly favor Northern Pacific stockholders . . ." (App. 292).

On June 2, 1960, after both First Boston and Morgan Stanley had advised their respective principals that they considered these proposed terms fair and equitable, the presidents of Great Northern and Northern Pacific agreed to the exchange ratios ultimately approved by the Commission (App. 291).[8] On July 13, 1960, these terms were approved by the boards of directors of the railroads, and were approved in 1961 by the stockholders of both companies (App. 291-292). The Northern Pacific stockholders' vote on that first occasion was 73.81 percent in favor of the merger and 6.64 percent against, with the balance not voting (App. 292).

Appellants then organized NPSC and solicited authority to represent other Northern Pacific stockholders in the merger proceedings (Ex. 145, Part A; Exam. Rep. 217). Appellant Brundage, Chairman of NPSC, testified (Tr. 9924):

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[8] Contrary to the implication that Northern Pacific acted "despite" the recommendation of Morgan Stanley (NPSC J.S. 8-9), Morgan Stanley recommended the final terms and representatives of both it and First Boston testified to the fairness of those terms (Tr. 326-327, 388; App. 45, 291).

> "Our committee was not organized for the primary purpose of obtaining a change in stock ratios more favorable to Northern Pacific stockholders but instead to enable the Northern Pacific stockholders to retain their present exclusive ownership of the natural resources properties of Northern Pacific." (Tr. 9924; see also App. 294)

To this end, NPSC intervened in the proceedings and proposed that the Commission order a segregation and sale of the Northern Pacific's natural resources properties prior to merger (App. 292-293). Under the NPSC proposal, these properties would have been sold to a newly-formed land company at a price ranging from $112 million to $117 million (App. 294). (See pp. 16-18 below.) Northern Pacific stockholders would have been given the right to subscribe to the stock of this company at about $20 per share, with all stock not so subscribed to be sold to the public (App. 294). Alternatively, NPSC proposed that the exchange ratio be constructed on the basis of the market value of the natural resources properties, rather than primarily on weighted earnings, or, if earnings were used, that a "very high" price-earnings ratio be applied to the earnings from these properties to reflect potential income from nonproductive property (App. 294-295).

The Examiner carefully reviewed the NPSC's evidence and rejected its contentions (Exam. Rep. 214-222). Since the Commission did not approve the proposed transactions on other grounds, it did not deal in its first report (App. 61) with the issues raised by NPSC. When the applicants sought reconsideration, NPSC sought further hearings with respect to the justness and reasonableness of the exchange ratios (App. 251). The Commission refused to hold further hearings for this purpose, but did reopen the proceeding

for reconsideration and oral argument on all issues (App. 251, 272-273).[9]

In its report on reconsideration, the Commission, after reviewing the negotiations leading to the adoption of the exchange ratios (App. 286-292) and the proposals of NPSC (App. 292-296), approved the negotiated terms (App. 297). With respect to NPSC's contention that market value, rather than earnings, should be used to value the natural resources properties, the Commission noted that NPSC itself, which had submitted values for these properties ranging all the way from $96 million to $295 million, "is unable to come forward with any definitive valuations" (App. 294, 296).[10] The Commission concluded that the

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[9] The Commission held further hearings at which evidence was received updating the prior estimates of savings to be achieved through merger to reflect the effects of (1) the applicants' agreements to accept extensive conditions for the Milwaukee and the North Western railroads, (2) the attrition agreements entered into with labor organizations, and (3) the fact that operational and other changes had occurred (App. 258). Both the carrier and labor agreements were entered into subsequent to the prior hearings and represented material changes in the circumstances related to the merger (App. 250). By contrast, NPSC sought further hearings on the same issues it had initially raised (App. 251, 471).

[10] The District Court found that "The Committee conceded that a definitive valuation would be difficult if not impossible" (App. 45). Appellants quibble with this finding, contending that the Committee Chairman, Mr. Brundage, did not make such a concession, but testified "that in his opinion no 'exact appraisal' (meaning in dollars) could be made" (NPSC J.S. 18-19). Another NPSC member offered no valuation and testified that "To measure the value of oil, timber or coal lands at the chance price of a given moment of time is likely to result in grave error" (Ex. 146, p. 4). Appellees are unable to see any substantial difference between NPSC's description of Mr. Brundage's testimony and the characterization of the NPSC evidence by the Commission and the court.

NPSC contention—that the use of weighted earnings as the primary basis of valuing Northern Pacific's contribution to the combined enterprise resulted in an unjust and unreasonable valuation of the natural resources properties—was

> "contrary to the record, which shows that the full potential value of the natural resources properties was fully reflected in the shares allotted to the Northern Pacific stockholders." (App. 296)

As to the NPSC proposal for segregation and sale of these properties, the Commission held that the plan was "without merit and unfair to Northern Pacific stockholders" (App. 296). It pointed particularly to the fact that, under the NPSC plan, Northern Pacific stockholders would be required to "repurchase interests in property they already own, with those failing to do so frozen out of future benefits therefrom" (App. 297). (See pp. 16-18 below.)

The Commission concluded by stating:

> "The issue here is whether the exchange ratios are just and reasonable, and limited thereto, we find the record both adequate and affirmative, in that they meet the necessary and required tests: (1) that they are the result of arms' length bargaining, and (2) that they fairly reflect the contributions of each group of stockholders to the combined system. Cf. *Erie R. Co. Merger*, 312 I.C.C. 185, and *Louisville & N. R. Co. Merger*, 295 I.C.C. 457." (App. 297)

After issuance of the Commission's decision approving the proposed transactions, the entire merger proposal, including the exchange ratios, was again submitted to the stockholders of the merging lines (App. 465).

NPSC waged a proxy campaign in connection with this second vote, attempting, on the basis of the arguments pre-

sented here, to defeat the proposal by persuading Northern Pacific stockholders either to vote against the proposal or to withhold their vote. On March 14, 1968, however, 73.20 percent of the Northern Pacific stockholders voted for the merger, and only 2.57 percent voted against (App. 46, fn. 20; 465, 471). [11]

On April 11, 1968, the Commission denied a further petition of NPSC again seeking to reopen the proceedings to determine the value of the Northern Pacific natural resources properties, holding that there were no material errors in its disposition of NPSC's contentions (App. 471).[12]

NPSC then sought review in the District Court for the Southern District of New York (NPSC J.S. 11). When that court refused to stay consummation of the merger on the basis of the NPSC contentions, NPSC intervened in the action brought by the Department of Justice in the District of Columbia and pursued its claims there (*ibid.*).

The contentions presented by NPSC to the District Court were essentially those pressed in this appeal (App. 42-46).

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[11] It is worth noting, in comparing the two occasions on which the stockholders considered the merger terms, that the vote against the merger declined from 6.64 percent to 2.57 percent, while the combined percentage of stockholders either voting no or not voting increased by only 0.61 percent (App. 46, fn. 20; 292, 465). These changes measure the impact on other stockholders of the seven-year campaign of NPSC.

[12] The Commission corrected "a minor misstatement of fact to the effect that expenses of organizing the new land company would be met by Northern Pacific, whereas NPSC actually proposes that they would be borne in the new land company itself . . ." (App. 471). It held that this misstatement was not "sufficiently serious as to warrant reconsideration of our previous decision or the further hearing desired by the petitioner" (*ibid.*).

As it has done here (NPSC J.S. 31-33), NPSC, to buttress its claim to reopening, departed from the record before the Commission to present more recent earnings for Northern Pacific and Great Northern, which it contends support its claims that the exchange ratio for Northern Pacific stock is unjust and unreasonable.

The District Court, after reviewing the record before the Commission and the Commission's consideration of the exchange ratios (App. 42-45), stated:

> "The Commission . . . based its approval upon an independent determination, considering the prolonged negotiations involving arms length bargaining as evidence of fairness in the exchange ratio and concluding that the ratio reflected fairly the contributions of each group of stockholders to the combined system." (App. 45)
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> "This whole matter, including the views advanced by the Committee, was explored in great detail by the Commission. On the basis of the record upon which the Commission relied, we have no reason to rule other than that the ratio which was established, with approval of the companies and of a large majority of their stockholders, is just and reasonable." (App. 45)

Turning to the NPSC contention that the record should be reopened, the court held:

> "Moreover, we do not agree that the Commission should be required to reopen the record to update it. We think that such fluctuations as the Committee refers to as possibly relevant are, as the Commission now urges, those normal fluctuations which can be expected to occur during the course of any protracted administrative proceeding and which have no effect upon the ultimate fairness of the Commission's finding. The arguments pro and con reopening cancel out each other sufficiently to leave the discretion exercised by the Commission free of abuse. *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 534-35." (App. 45-46)

NO SUBSTANTIAL ISSUE IS PRESENTED FOR PLENARY REVIEW BY THIS COURT

Appellants advance thirteen "questions presented" evidently on the theory that proliferation will create an aura of substantiality. Repeatedly they assert that NPSC's evidence was "positive" and "unrebutted" (*e.g.*, NPSC J.S. 13, 14, 17, 24). A glance at the extensive testimony reviewed by the Examiner (Rep. 200-222) and the Commission (App. 289-297) clearly shows that NPSC's testimony was inconsistent and thoroughly contradicted. NPSC's contentions have been tested, retested and found without merit by the stockholders, the Commission and the District Court.

1. The District Court's Ultimate Conclusion Sustaining The Commission's Findings With Respect To The Exchange Ratios Was Clearly Correct. In reviewing the Commission's findings and conclusions, the District Court clearly and correctly recognized that its role was limited to determining whether the Commission had complied with the governing law and whether its conclusions were supported by findings based on substantial evidence (App. 20). *Penn-Central Merger Cases*, 389 U.S. 486, 498-499; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535-536.[13] Under these tests, appellants' attack on the decision of the District Court is specious.

In addition to contesting the well-supported findings, that attack involves a distorted reading of *Schwabacher* v.

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[13] The District Court also cited (App. 42) *Friedman* v. *United States*, 168 F. Supp. 815 (S.D.N.Y. 1958), aff'd *per curiam* 359 U.S. 205. There, in rejecting a railroad stockholder's challenge to the valuation of his stock, it was observed that "Because of the broad authority conferred upon the Commission by § 5 of the Interstate Commerce Act and the technical complexities of a merger case, the doctrine of administrative finality is particularly applicable" (168 F. Supp. at 818).

United States, 334 U.S. 182, and an erroneous interpretation of 49 U.S.C. § 5(2)(b).

Contrary to appellants' contentions, the *Schwabacher* case does not stand for the proposition that the valuation of the properties in a railroad merger cannot be based primarily on earnings (NPSC J.S. 18). To the extent that *Schwabacher* provides general guidance as to the principles for determining the justness and reasonableness of agreed exchange ratios, it simply teaches, as a district court noted, that the appropriate test of fairness is whether the agreed ratios reflect "what the stockholders of each of the railroads will contribute to the resulting enterprise." *Stott* v. *United States*, 166 F.Supp. 851, 857 (S.D.N.Y. 1958). This is the standard which the Commission followed (App. 297), and the standard against which the District Court tested the Commission's findings and conclusions (App. 45).

The references in the *Schwabacher* case to "intrinsic or market values" (334 U.S. at 201-202) were obviously not intended to dictate some particular method of determining the "worth" of the stock. In context, those words served simply to distinguish the value of the contribution which the stockholder is making to the merger from the "value" of his stock determined by the corporate charter (334 U.S. at 199). Plainly, this distinction does not purport to limit or prescribe the method by which the "intrinsic value" of the stock is to be determined. Certainly, it is not a prohibition against determining such value on the basis of earnings.

It has long been recognized that the value of a railroad "basically . . . is dependent upon the present and prospective earning power of the properties. . . ." *Chicago G.W.R. Co. Reorganization*, 247 I.C.C. 193, 196 (1941). And in *Penn-Central Merger Cases*, where the Commission had fixed the exchange ratios for Norfolk and Western's acquisi-

tion of two railroads "in relation to the experienced income of the lines" (389 U.S. at 523), this Court found that method to be "reasonably conventional and generally accepted, always subject to the modifications and adaptations required by individual cases" (389 U.S. at 524).

The record clearly supports the Commission's finding that, in arriving at the exchange ratios, applicants balanced the "full potential value of the natural resources properties" (App. 296) against the current value of Great Northern's larger earnings. Appellants' real contention here is not that the Commission applied an erroneous standard of valuation as a matter of law, but that, in valuing the Northern Pacific natural resources properties, the Commission failed to accord the earnings from these properties as much weight as NPSC said they should be given.[14]

The valuation of earnings from the natural resources properties involves "factors of particularized judgment and the weight to be ascribed to various values" (389 U.S. at 524). As this Court stated in *Penn-Central Merger Cases:*

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[14] Appellants contend that "In capitalizing earnings they [the applicants] in no way distinguish between the quality of earnings from railroad properties and that from natural resources properties" (NPSC J.S. 24). This contention is refuted not only by the evidence and the findings of the Commission (App. 292, 296) and the District Court (App. 45), but also by the very data used by NPSC (NPSC J.S. 18a-19a). If the five-year average per share earnings shown there for the Northern Pacific ($3.83) and Great Northern ($4.40) had been treated equally, Northern Pacific stockholders would not have received the same share-for-share exchange that the Great Northern stockholders receive. And, with respect to the one-half share of $10 preferred stock, it should be noted that payments on that stock will be made from the earnings of Great Northern as well as Northern Pacific, that the interest rate is 5½ percent and that there may be a thirty year delay in payment of the $5.

> "These are matters as to which reasonable men may reasonably differ in detail. . . . We deem it our function, in the complexities of a case such as this one, to review the judgment of the District Court with respect to agency actions to make certain that those actions are based upon substantial evidence and to guard against the possibility of gross error or unfairness. If we find those conclusions to be equitable and rational, it is not for us to second-guess each step in the Commission's process of deliberation." (389 U.S. at 524)

The careful consideration of the record by both the Commission and the District Court (App. 42-46, 286-297) amply demonstrates that the approval of the exchange ratios and rejection of the NPSC segregation-sale plan are supported by adequate findings based on substantial evidence. The appellants' claims to the contrary are frivolous.

Appellants' quibbles with the findings concerning their evidence are like those of the plaintiffs in *Stott* v. *United States*, 166 F. Supp. 851, 862 (S.D.N.Y. 1958), where the court rejected a contention

> "... that the Commission should have stated its reasons for rejecting numerous specific items of evidence which the minority adduced instead of giving its conclusions as to the various factors which it considered in general terms."

The Commission reviewed all of the NPSC's contentions in considerable detail. For example, NPSC (J.S. 9, 34) describes as "constructive" its proposal for sale and segregation of the natural resources properties. But the Commission found the proposal to be "unfair" even to Northern Pacific stockholders and "no real answer" to the valuation problems and stated reasons for those conclusions (App. 296-297). The NPSC plan would have entailed setting some definitive valuation price on the properties to be sold (a matter on which it offered no such valuation and which

its evidence aptly confirmed was "likely to result in grave error," Ex. 146, p. 4); incurring substantial corporate capital gains taxes and other additional expenses; and compelling each Northern Pacific stockholder to choose between foregoing any interest in those properties or somehow raising funds to continue an equitable interest in them.[15]

Thus, as the District Court found and as the Commission's report shows, the Commission gave full consideration to all of the appellants' contentions. That is all the Commission is required to do. Cf. *Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173, 193.

With respect to NPSC's proposed sale of the natural resources properties to a new land company, it should be added that NPSC "Suggested purchase price figures [that] varied from $112 million to $117 million, although members of NPSC advanced values ranging from $96 million to $295 million . . ." (App. 294). The suggested purchase price was, ironically, based on the same "judgment value" that the Chairman of NPSC agreed was inadequate (Tr. 9910-9913, 14374-14375). In other words, NPSC said that the judgment value was low and unreliable but just about right for a sale to its proposed land company. In one table in the Appendix to its Jurisdictional Statement (Schedule 3, p. 20a), NPSC utilizes a gross valuation of about $170 million for the natural resources properties, but the Commission noted that Northern Pacific itself had considered that figure to be "much in excess of what the properties would sell for" (App. 290). If one substituted in that table the $96 million which was the approximate net amount that NPSC pro-

[15] If a Northern Pacific stockholder decided, for example, to raise such funds by selling his Northern Pacific stock, he would to that extent be giving up his interest in the railroad properties and be exposed to possible capital gains taxes on the sale of his stock.

posed that Northern Pacific receive for selling its natural resources properties,[16] the result would show Great Northern being entitled to be favored over Northern Pacific by ratios of 1 to 0.903 or 0.913. The serious problems involved in NPSC's evidence actually confirmed the wisdom of not proposing a sale and in relying primarily on weighted earnings.

NPSC would attribute no significance either to the arms length negotiations which produced the exchange ratios or to the repeated approval of those terms by more than 73 percent of the Northern Pacific's stockholders. The Commission has long recognized that, in a voluntary merger, the fact that the exchange ratios proposed by the applicants have been arrived at by arms length negotiations is important evidence showing that the terms are just and reasonable. In *Norfolk & W. Ry. Co. and New York, Chicago & St. Louis R. Co.—Merger,* 330 I.C.C. 780, 800 (1967), it was noted that:

> "The Commission . . . stated at an early date that, although it will make the type of inquiry into the terms of a control transaction that the particular circumstances require, where a transaction is bargained at arms' length, each side is 'presumably capable of determining their own best interests'. . . ."

Here, as the District Court found, the Commission in making the independent determination of fairness, considered "the prolonged negotiations involving arms length bargain-

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[16] The basic price used by NPSC was approximately $96 million and that was then increased by NPSC in order to reimburse Northern Pacific for the estimated capital gains taxes that would be incurred in selling the properties. Those capital gains taxes totalled $20 million and brought NPSC's purchase price to about $117 million in order "to enable Northern Pacific to retain the [NPSC's] intended amount of $96 million." (See Exam. Rep. 219.)

ing as evidence of the fairness in the exchange ratio" (App. 45). There can be no question that it was proper for it to do so.[17]

With respect to stockholder approval of the merger (App. 45, 471), it should be noted that this is not a case where one class of stockholders has been outvoted by other classes having adverse interests. Northern Pacific has only one class of stock, and the effect of the proposed exchange ratio on NPSC and the few stockholders it represents is precisely the same as on the 73 percent majority which voted in favor of the proposed terms. Moreover, despite NPSC's attempts to create a contrary impression (NPSC J.S. 19), the second affirmative vote came in March, 1968, after the full development of the issues before the Commission and in the face of a proxy fight waged by NPSC.

The conclusion of the District Court in *Fried* v. *United States*, 212 F. Supp. 886, 892 (S.D.N.Y. 1963), is appropriate here:

> "Based upon the record as a whole, . . . it is clear that the Commission properly applied the standards of the Act in its examination of the exchange ratio and that its findings are supported by substantial evidence. Basically, what plaintiffs want this Court to do is sub-

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[17] NPSC's contention that there is some doubt that the exchange ratios were the result of arms length bargaining (NPSC J.S. 21-23) is incredible in view of the record of almost 5½ years of negotiations between the parties, each advised by its separate independent experts. The fact that the presidents of *both* railroads felt a merger to be necessary (NPSC J.S. 22) in no way detracted from their relative bargaining strength. Rather, as the Commission found, it resulted in a "realistic appraisal of the terms necessary to bring about acceptance by both sets of stockholders" (App. 292). This is another way of saying that the benefits of merger led to agreement on terms that were fair to both sides, rather than having one side or the other press for an unfair advantage.

> stitute its judgment for that of the Commission as to the importance in this context of factors which plaintiffs claim should have been given greater weight.... This we should not and will not do."

2. The District Court's Conclusion That The Commission Had Not Abused Its Discretion In Refusing To Reopen The Record Was Clearly Correct. Appellants' argument that the District Court erred in refusing to order the Commission to reopen and "update" the record concerning their contentions is based on the erroneous assertion that it is "well settled law" that

> ". . . the justice of the stock exchange ratios must be determined as of the date of consummation of the merger when the old shares must be surrendered for shares in the new company. . . ." (NPSC J.S. 29-30)

The mandate of the *Schwabacher* case that "In appraising a stockholder's position in a merger as to justice and reasonableness, it is . . . current worth . . . that governs" (334 U.S. at 199) cannot be stretched this far.

Proceedings under Section 5(2) of the Interstate Commerce Act are inevitably time consuming. See, *e.g., Penn-Central Merger Cases,* 389 U.S. at 494-495. The transactions proposed cannot be consummated until they are approved by the Commission, and, more often than not, until that approval has been reviewed and upheld by the courts. Under these circumstances, if the determination of the justness and reasonableness of the exchange ratios were required to be made "as of the date of consummation," no Section 5(2) proceeding would ever end.

Neither the statute nor the decisions construing it require such a result. Contrary to appellants' contention, it is clear that the determination of the fairness of the terms is to be on the basis of the record made before the Commission, and

only in the most extreme circumstances will the Commission be required to reopen the record to take account of later data.

In *Erie-Lackawanna R. Co.* v. *United States*, 279 F. Supp. 316, 340 (S.D.N.Y. 1967), aff'd *sub nom. Penn-Central Merger Cases*, 389 U.S. 486, the court upheld Commission-determined exchange ratios based on the 1965 earnings figures available at the time of the hearings, even though materially different 1966 earnings figures were not only available but were included in the record prior to the decision. The court stated:

> "The hearing examiner and the Commission having properly used 1965 figures, they were not required to start anew when the 1966 figures . . . became a part of the record. . . . These are simply raw figures which have not been analyzed to remove extraordinary items or to place others on a full year basis; by the time the experts could do that and the Commission could render a new report, 1967 figures would be available and, on N & W's argument, the process must start again. The law does not compel an infinite regress." (279 F. Supp. at 340)

Whether an administrative proceeding should be reopened to receive evidence of changed circumstances is a question committed to the discretion of the administrative body, and its resolution of that question will not be disturbed unless there is "a showing of the clearest abuse of discretion." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535.

Appellants rely primarily on the passage of time since the record was made before the Commission and recent fluctuations in the relative earnings of the parties and the market prices of their stocks in urging that this record should be reopened. They assert that "Here the record

must be reopened to show the impact on values resulting from economic inflation long in process" (NPSC J.S. 30). But the NPSC's views on matters relating to "monetary inflation" are not new, for as the NPSC pointed out in a petition to the Commission dated January 11, 1968:

> "This factor was stressed in all aspects of our Committee's direct case in the record. . . . It was the subject of extensive cross-examination of applicants' witnesses who negotiated and advised concerning the proposed merger terms." (Pet. 17)

Nor do appellants deny that "monetary inflation" was taken into account in negotiating the merger terms; they simply continue to debate the degree to which it should be considered (NPSC J.S. 30-31). Certainly the Commission has not abused its discretion in refusing to reopen the record on this matter. As the court appropriately observed in *Illinois Central R. Co.* v. *United States*, 263 F. Supp. 421, 434 (N.D. Ill. 1966), aff'd *per curiam* 385 U.S. 457:

> "Records in long and complex cases are inevitably outdated on the day of decision and the Commission has broad discretion to refuse to permit further delay to obtain evidence of changed conditions. Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 514-515. . . . Compare Atchison, T. & S. F. R. Co. v. United States, 284 U.S. 248 . . . (Great Depression, rehearing required), with United States v. Pierce Auto Freight Lines, 327 U.S. 515, 535 . . . (World War II, rehearing denied)."

Moreover, appellants themselves recognize that "changes in facts as to earnings and other statistical data and circumstances and conditions are bound to occur during any protracted agency proceeding . . ." (NPSC J.S. 30). And

neither the mere passage of time nor changes in financial position require the Commission to reopen this record.[18] As this Court acknowledged in *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 518, if supervening events, and particularly changes in financial position, required administrative agencies to reopen their records, "'. . . final administrative disposition and judicial review may often be prevented altogether by the mere fact that they take time.'"

The District Court appraised the allegations upon which NPSC relies to support its claim that the Commission abused its discretion in refusing to reopen these proceed-

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[18] Great Northern's average annual earnings for the latest five-year period through 1968 (the length of period relied upon by First Boston and Morgan Stanley, App. 290) exceeded the earnings of Northern Pacific by $2,519,832. Short-term fluctuations, of course, may occur from time to time. In 1967 and 1968 the earnings of both roads fell substantially below the level of 1966. These have been unusually bad years for railroads in that labor expenses have increased drastically, resulting in the first general rate increases since 1960. (332 I.C.C. 280; 332 I.C.C. 590, 714). In 1967 Northern Pacific's earnings did not fall quite as far as those of Great Northern; the earnings of the latter, as reported to the Commission, were $4,132,000 lower than the former. In 1968, despite the fact that the year was still a bad one for earnings, both roads earned a little more, and Great Northern reported earnings only $3,385,000 below Northern Pacific. A major factor affecting Great Northern's earnings in these two years has been that grain has been stored in unusually large quantities in country elevators and other interior storage points, awaiting resumption of the normal volume of grain shipments, and grain constitutes a disproportionately large part of Great Northern's shipments as compared to Northern Pacific. A one-year or two-year period is clearly too short a period from which to make comparative projections of relative earning ability. The District Court properly found that such fluctuations are to be expected and have no effect upon the ultimate fairness of the Commission's finding (App. 45-46).

ings. The court was clearly correct in disposing of those allegations and the requested reopening:

> "[S]uch fluctuations as the Committee refers to as possibly relevant are, as the Commission now urges, those normal fluctuations which can be expected to occur during the course of any protracted administrative proceeding and which have no effect upon the ultimate fairness of the Commission's finding." (App. 45-46)

CONCLUSION

The exchange ratios between Great Northern and Northern Pacific were studied and negotiated at length. The ratios have been approved by expert financial advisers, twice by stockholders, by the Hearing Examiner, by the Commission and by the three-judge District Court. No significant legal or factual issue is involved and the judgment below should be affirmed without further briefing and oral argument.

Respectfully submitted,

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February, 1969